



Brussels, July 2020

BSA submission to the European Commission Inception Impact Assessment on a Legislative framework for the governance of common European Data Spaces

BSA | The Software Alliance (BSA)¹ welcomes the opportunity to provide feedback in response to the Inception Impact Assessment on a Legislative framework for the governance of common European Data Spaces. BSA is the leading advocate for the global software industry. Our members are at the forefront of software-enabled innovation that is fueling global economic growth by helping enterprises in every sector of the economy operate more efficiently. As global leaders in the development of data-driven products and services, BSA members have unique insights into how European Data Spaces could encourage the uptake of AI tools, data analytics and how they could further help the EU to become a leading role model for a society empowered by data to make better decisions – in business and the public sector.

Data is the lifeblood of the modern digital economy – powering innovation and growth across the globe and enabling organizations to create new jobs, boost efficiency, drive quality, and improve output. BSA is strongly supportive of the European Strategy for Data released in February 2020, as sound and innovative data policies are fundamental to ensure the EU's primary role in the global economy.

In particular, the ability for companies to access and share data has a significant influence on economic development and growth, on a large scale due to its relevance on the development of AI. Moreover, as European and Europe-based companies face the unprecedented challenges born out of the COVID-19 crisis, it becomes even more important to ensure balanced rules and guidelines for the management of personal and non-personal data. In this context, BSA would like to submit the following recommendations with regards to the Common European Data Spaces and related policies.

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

BSA's members include: Adobe, Akamai, Atlassian, Autodesk, Bentley Systems, Box, Cadence, Cloudflare, CNC/Mastercam, IBM, Informatica, Intel, Intuit, MathWorks, McAfee, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

Common European Data Spaces. The creation of “Common European Data Spaces” in strategic sectors as foreseen in the European Strategy for Data can greatly increase the innovation potential of Europe’s economy with immense benefits to society. These data spaces need to be accessible to all market participants, both commercial and non-commercial, and enable an ecosystem where all participants can use and access data in a trusted, safe and secure environment. BSA would like to stress that a regulatory framework for the data governance of these data spaces should lay out high-level rules for open, transparent and structured stakeholder involvement and decision-making processes to provide the necessary flexibility and legal certainty to empower market participants and the public sector to participate in data spaces.

However, a horizontal legislation on data governance should not be prescriptive and focus on setting high-level rules aimed at addressing compatibility, interoperability and participatory issues around data spaces. Specific vertical data spaces may need adapted holistic data governance rules to ensure that innovation is not constrained within these sectors, and that trust is maintained. Data spaces should not constrain innovation in fast-moving ecosystems.

The development and adoption of the contemplated data spaces can and should be implemented in phases. For example, the data spaces can begin with creating open data environments, including government data released under open data licenses, to develop a culture of data sharing and free exchange among participants. Targeting open data first will enable the development of the data governance practices, standards, and data licensing infrastructure needed to establish robust data sharing environments without the complexity of managing dueling commercial interests.

While these data spaces will be populated by stakeholders such as businesses, research institutions, individuals, and governmental entities, the scope should clearly identify what types of data will feed into the data spaces. This will require a continuous dialogue between policymakers and all relevant stakeholders. Finally, the data spaces should allow for participation from a broad range of stakeholders, and should place all market players who comply with European legislation and the EU Acquis, regardless of their size and their origin, on equal footing.

Promote Voluntary Industry Data Sharing. While there is increasing recognition of the collective benefits of data sharing, the establishment of collaborative data sharing arrangements can be impeded by a range of technical, legal, and organizational challenges. In particular BSA encourages the European Commission to support the development, availability, and adoption of tools and best practices that make it easier and less expensive to share data in ways that are consistent with rigorous privacy expectations. Technical tools, such as application programming interfaces (APIs), can facilitate data exchanges that are faster and more secure than traditional transfers and create opportunities for empowering the public with greater access to their own data. Some level of standardization may be required in this area, but any standards developed should be market-led, developed in cooperation with industry. Further, any standards

should recognize the specificities of sectors and use cases to which they may apply, and take into account and build upon the many existing standards in this area.

In addition to technical tools, the European Commission should look for opportunities to promote the development and use of standardized data licensing models. Much as the development of standardized open source licenses gave rise to a new model for software innovation, standardized data license agreements can facilitate new collaborative approaches for sharing data resources. The Linux Community Data License Agreement² and the Open Use Data Agreement³ are good examples of industry efforts to create tools that will democratize the value of data by making it easier for all stakeholders to voluntarily share data in a manner that is predictable and trustworthy.

Improved access to data need not come at the expense of privacy. Indeed, a range of privacy-enhancing technologies and data governance structures can enable value-added uses of data without compromising the confidentiality or security of the underlying data. To that end, the European Commission should promote the use of privacy enhancing technologies – such as differential privacy, homomorphic encryption, and federated machine learning – to create opportunities for sharing data while preserving individual privacy. The European Commission should likewise support the development of innovative data governance structures – such as data trusts, data cooperatives, and data commons – that facilitate public and private sharing of data in ways that preserve privacy while enabling participants to benefit from the analysis of potentially sensitive data. Investments in R&D and the creation of regulatory sandboxes can also help spur the development of such arrangements.

In general, BSA is supportive of the role of data intermediaries to enhance private exchanges of data in the data spaces. They can be cost-effective ways to ensure that high-quality data is pooled and shared in a transparent manner, which in turns contributes to a significant decrease in costs for data sharing. In this context, we welcome further clarification by the European Commission on the role, nature and objectives of data intermediaries and to foster common understanding at EU level.

To foster the data economy and enable data spaces, a more uniform interpretation and application of the GDPR is necessary to move towards a higher degree of harmonization between Member States. Providing more legal certainty through EDPB guidelines and a standardized industry approach which includes a risk-based view to the anonymization of data are key factors to incentivize more data sharing and usage.

Furthermore, the proposed e-Privacy regulation should ensure consistency with the GDPR requirements (for instance with regard to the legal grounds for processing of personal data). As the e-Privacy regulation in its latest drafting will also apply to non-personal data, the scope of the regulation needs to be clarified to make sure that the uptake of data usage in all sectors and technologies such as cloud computing, AI or edge computing are not negatively impacted. Additionally, outstanding cybersecurity

² The Linux Foundation Projects, Community Data License Agreement, <https://cdla.io/>

³ Microsoft, The Open Use of Data Agreement, <https://github.com/microsoft/Open-Use-of-Data-Agreement>

issues – including software updates – in the proposed e-Privacy draft Regulation need to be resolved to avoid unnecessary and unintended practical issues.

Access to Government Data and Public Sector Information. Government-generated data is a resource that can serve as a powerful engine for creating new jobs and promoting economic growth. At both the local and national level, governments collect and generate vast quantities of data that can be harnessed in the development of AI systems, data analytics and more broadly would allow for a stronger and industry more responsive to the needs of customers.

In this context:

- a. *Putting government-held data to use:* Sound data policies should ensure that any non-sensitive government-generated data asset is made freely available to the public in machine-readable formats. This data — a resource whose full potential would otherwise go unrealized — can improve services and lower prices. For instance, an AI system designed to improve supply chain efficiency might rely on government data about historical traffic flows, law enforcement event advisories, and weather patterns to recommend delivery routes that minimize congestion, reduce emissions, and improve public safety.
- b. *Preventing data lock-up through procurement:* Governments should carefully consider the effect that procurement policies can have on the availability of data. As a general matter, governments should avoid service agreements that would grant exclusive access or use rights to government datasets to any single private entity. Increasingly, government data is being generated by third-party vendors. For instance, local transit authorities may contract with third-party vendors to analyze data generated by buses and trains, or by sensors embedded in street lights and roadways. Governments contracting for such services should ensure that any statistical data created or maintained on its behalf as part of the agreement is not subject to access or use restrictions. Rather, data provided to governments as part of such procurement contracts should be treated like any other government data asset and should be made freely accessible for public use.

BSA supports the recently updated EU Open Data Directive and agrees with the European Commission's efforts to make specific high-value public datasets available, where appropriate, as there is significant potential in its re-use in new products and services.

Facilitate Value-Added Data Services. Data is the key to growth in all sectors of the economy, but each piece of data has little inherent value. It is only when used as an input to other value-added services that it contributes to the projected \$15 trillion addition to global GDP by 2030.⁴ Policies that artificially increase the costs for acquiring data will

⁴ BSA, What's the Deal with Big Data, available at https://data.bsa.org/wp-content/uploads/2015/12/bsadatastudy_en.pdf

ultimately increase the costs of innovative technologies for customers and decrease the incentive to develop and use new technology — potentially reducing overall consumer welfare. The European Commission should pursue policies that facilitate the business-to-business exchange of data, including by:

- a) Ensuring companies can enter enforceable contracts that create data sharing arrangements;
- b) Avoiding the creation of new rights in business data that could add unnecessary transaction costs; and
- c) Allowing companies to freely perform data analytics, including Text and Data Mining (“TDM”), on any content to which they have lawful access.

BSA has been a strong advocate for a mandatory exception for TDM in the EU Copyright Directive,⁵ and strongly encourage the European Commission to ensure the appropriate implementation of the text of Art. 4 of the Directive, to ensure strong protections for rightsholders, while providing for legal certainty for data innovators and researchers.

Cloud and edge computing. The European Strategy for Data suggests creating a Cloud Rulebook that would serve as a repository of applicable rules, including codes of conduct and certifications for cloud services. BSA welcomes the idea to centralize and document industry-led standards that can bring more clarity to customers when navigating the cloud landscape. In this context, BSA would support the idea of setting-up a cloud services marketplace, that would help demonstrate the vibrant market for cloud solutions in Europe, a potential that is still under tapped. However, this should not lead to measures at EU or national levels that may impose market access or other unjustified barriers, such as preferential treatment or data localization measures.

BSA stresses that the approach to strengthening Europe’s cloud infrastructure should be inclusive, open and based on trust and credentials. Strengthening technological capacity-building and working with like-minded partners that have strong commitments to Europe go hand-in-hand, regardless of the location of their headquarters. Transparency, interoperability and openness should be the key fundamentals to an open, secure and future-facing European data infrastructure. Also, and as the Strategy notes, there is a low cloud uptake in Europe (with one 1 company in 4 on average, only 1 in 5 for SMEs⁶) including in the European public sector. We encourage the European Commission to further promote cloud adoption in both the private and public sector throughout the European Union. Initiatives that can promote the legal certainty around the use of cloud can be helpful, but they also need to be consistently implemented across Member States.

The recent and still ongoing COVID-19 crisis has shown that using software and cloud services can improve the ability of employees to collaborate, companies to reach consumers, and governments to reach citizens in a secure and efficient manner. Cloud

⁵ For more information please visit <https://www.bsa.org/news-events/news/bsa-applauds-eu-decision-to-enact-mandatory-exception-for-text-and-data-mining-in-copyright-directive>

⁶ https://ec.europa.eu/eurostat/statistics-explained/index.php/Cloud_computing_-_statistics_on_the_use_by_enterprises

has been a catalyst for innovation during Covid-19 and ensured continuity of public service. In this regard, the recently released BSA Response and Recovery Agenda⁷ highlights a number of policy priorities and strategic initiatives that could be fostered in the EU to enable governments and their citizens to prepare for and implement increased remote working, resilient education systems, and other remote-based activities, such as remote medical consultations. Among these recommendations, encouraging and enabling the use of software and cloud services for continued business and government operations as well as promoting responsible migration to cloud services are essential to contribute to the success of the digital transformation of European industry and society.

Lastly, as the European Strategy for Data rightly points out “European companies operate in a connected environment that goes beyond the EU’s borders, so that international data flows are indispensable for their competitiveness.” The free flow of data across borders is critical for the services that sustain global commerce, improve health and safety, promote social good, and enable the technologies of the future.

BSA would welcome the opportunity to further explore ways to support the Commission’s efforts to develop policies and initiatives to drive better cloud adoption throughout the EU.

⁷ <https://www.bsa.org/files/policy-filings/05272020bsaresponserecoveryagendaa4.pdf>